BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
SHEBOYGAN COUNTY	:	Case 180 No. 48528 MA-7632
and	:	
SHEBOYGAN COUNTY SUPPORTIVE SERVICES, LOCAL 110, AFSCME, AFL-CIO	:	

Appearances:

Helen Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Street, Sheboygan, WI 53083, appearing on behalf of Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO.

Louella Conway, Personnel Director, Sheboygan County, 615 North Sixth Street, Sheboygan, WI 53081, appearing on behalf of Sheboygan County.

ARBITRATION AWARD

Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO, (hereinafter Union) and Sheboygan County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator named by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On December 21, 1992, the Union filed a request to initiate grievance arbitration in this matter with the Commission. Following concurrence with said request by the Employer, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on April 5, 1993, in Sheboygan, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The parties filed briefs, the last of which was received on May 5, 1993. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

Jodell Henning (hereinafter Grievant) began working as a reception clerk in the Child Support Office on June 1, 1992. 1/ The manager of the Child Support Enforcement Program, James Graf (hereinafter Manager), was her supervisor. One of the case

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1/ All dates are 1992 unless otherwise indicated.

specialists working in the office was Rhonda Bohrmueller (hereinafter Case Specialist).

Prior to June 1, the Grievant's daughter, Pamela TenPas (hereinafter Daughter), was married to and divorced from David TenPas (hereinafter Former Husband). Together they had a daughter. He had also allegedly fathered a child with Lu Ann Schukow (hereinafter Client), although the paternity of said child had not been determined as of June 1. At the time of hearing, the child was four years old. The Daughter, Former Husband and Client all knew each other as they worked in the same company.

Also prior to June 1, the topic of the child's paternity had been discussed several times between the Grievant and the Daughter and between the Daughter and the Former Husband. The topics of discussion included whether the Client would file a paternity action against the Former Husband in order to secure child support and whether the Former Husband should have a blood test as part of the determination of paternity.

In early June, the Former Husband told the Daughter that the Client was going to apply for child support. The Daughter told the Grievant that the Client was going to come to the Office and advised her not to get involved. The Grievant went to the Manager and told him that someone was coming into the Office for child support to whom she was connected. She told him she wanted to be removed from dealing with the Client as the Grievant saw it as a conflict of interest. The Manager denied the request, saying all she would have to do was take information.

Sometime in June the Client did go to the Office and she received an application for child support. The Client returned the application later in June. The Grievant met with the Personnel Committee on June 29. One of the topics of discussion was the Grievant's belief of a conflict of interest in her working with the Client. The Committee did not take any action. On July 7, a file was opened for the Client.

On July 17, the Manager issued a written reprimand to the Grievant for allegedly violating the Employer's written telephone policy and the general guidelines and procedures established for the Reception Clerk position. On July 21, the Manager suspended the Grievant for one day for falsifying her time sheet. The Grievant grieved both disciplines, with arbitrations pending in both cases.

The Grievant also met with the Law Enforcement Committee on July 20, at which meeting the same issue was discussed. Again, no action was. At staff meetings on August 5 and 13, at which the Grievant was present, the Employer discussed the standards of

confidentiality. The Client met with the Case Specialist on August 18.

On August 31, the Daughter and the Former Husband were shopping separately at Wal-Mart. He approached her and a conversation ensued. The Daughter asked the Former Husband about the Client filing for child support. He told the Daughter that the Client had done so, as he said she would.

On September 2, the Client called the Office and spoke to the Case Specialist. The Client told the Case Specialist that the Former Husband had told her that he had been shopping when he met the Daughter, that the Daughter had said to him that she had heard that the Client had filed for child support, and that the Daughter had told him that the Grievant had told her this information.

The Case Specialist forwarded the call to the Manager. The Client repeated her story and asked why certain information was talked about outside the office. He asked her to put her statement in writing but she declined to do so. The Manager and/or the Case Specialist drafted a statement for the Client, sent it to her and requested that she sign and return it. 2/

2/ Sometime later, the Client signed and returned it. The statement is as follows:

> I, Lu Ann Schukow, telephoned the Child Support Agency on Wednesday, September 2, 1992, to inquire about my case. I spoke to Rhonda regarding the above and then relayed the following to her as well as to James Graf:
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> I told them that my boyfriend was shopping at WalMart recently and ran into his ex-wife, who approached him regarding my file at the Child Support Agency. His ex-wife knew the details of the case at your agency and then told him to have blood tests done because she doesn't believe that he is the father of my child.
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> I was very disturbed by what happened and blame this for the problems which I and my boyfriend are experiencing. I told Mr. Graf that I did not wish to give the reception clerk any more information regarding my case, as she is the mother of my boyfriend's ex-wife.

The Manager went to a department heads meeting, after which he spoke to the Personnel Director about the matter. He then reviewed the policy and procedures manual regarding confidentiality of paternity issues. He also reviewed the Grievant's file which included the written reprimand and one day suspension. He then determined to suspend the Grievant for five days, effective September 3.

The Manager met with the Grievant and informed her he was giving her a five day suspension effective September 3. He asked her if she wanted a Union representative present. She said "no". He then told her that he had received a call from the Client who said the Grievant had breached confidentiality. The Grievant stated that the Daughter had told her that the Client was coming into the office before she did. During the meeting, the Manager asked the Grievant to sign an Employee Report. Said report, written and signed by the Manager, states in part:

> I received a phone call from a new paternity client. She stated the alleged father of her child was approached by his ex-wife at a local store on 8/31 and he was told by her that our client had opened a case and was going to persue (sic) paternity on her son. The exwife (sic) stated that the information came from her mother. Jodell is the exwife's (sic) mother. A written statement will be sent to us. This is a breach of confidential materials.
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> I gave Jodell a 5-Day Suspension beginning 9/3/92 and ending 9/10/92. Further infractions will result in discharge.

Later that day, the Daughter called the Manager and told him that she had been told by the Former Husband in early June that the Client was going to file for child support, and that she had told the Grievant this. The Daughter sent a letter to the Manager dated September 3, which summarized her statement.

The Grievant filed a grievance, which grievance proceeded through the parties procedure without resolution. It is properly before the Arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

> Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

ISSUE

The parties stipulated to framing the issue as follows:

> Did the Employer violate the contract when it gave Jodell Henning a five-day suspension on September 2, 1992?
>
> If so, what is the appropriate remedy?

POSITION OF THE PARTIES

Union

On brief the Union argues that the Employer was forewarned that the Client's involvement with the Child Support Office would be uncomfortable for her and the Grievant; that the Grievant showed more common sense in this situation that the Employer which, after more than three warnings, insisted on putting the Grievant "in harm's way"; that the result was a nasty, uncomfortable situation for both the Client and the Grievant; that the Grievant lost five days pay; and that the Employer is able to claim another notch on the progressive discipline latter toward termination.

According to the Union, the discipline was not for proper cause because the Employer never proved that the Grievant breached any confidentiality or that she did anything wrong; that before the Grievant came into the Office, the Grievant knew that the Client was contemplating asking for child support; that paternity of the child was discussed in the family prior to the Grievant's transfer into the Office; and that the Former Husband told the Daughter in early June that the Client was coming in to file papers against him.

Related to this, the Union argues that any allegation, other than that the client was coming into the office, is not part of the record; that the Arbitrator refused to direct the Case Specialist to answer the question regarding exactly what details the Employer is accusing the Grievant of discussing; that since the burden of proof is on the Employer, the Employer failed to

make a case of this accusation; that the Arbitrator can not justify an allegation and not know its contents; that the Grievant cannot defend herself on a "double secret" allegation; that the Client testified that all the Former Husband said is that the Grievant told the Daughter that the Client had filed for child support; that this is different from the signed statement written by the Manager and the Case Specialist for the Client to sign; and that the Client testified that the Grievant did not know the details of the case and that nothing was said about them at Wal-Mart.

In addition, the Union argues that the Employer, not the Grievant, is responsible for the Client's uncomfortableness regarding confidentiality; that several times before the Client ever came to the Office, the Grievant went to the Manager and other Employer representatives to say trouble was coming; and that at least two formal meetings were held in which she in essence begged not to have anything to do with the Client.

Finally, the Union argues that the Employer by its actions and non-actions in the investigation process has failed to support the five day suspension for just cause; that the Employer never contacted the Daughter or the Former Husband prior to the giving of the five day suspension; that an investigation process must be conducted fairly to support a proper cause for discipline; and that to rely on the Client, a hostile witness to the Grievant, shows a definite predetermination to chalk up another disciplinary action against the Grievant.

The Union asks that the grievance be sustained and the Grievant made whole.

Employer

On brief, the Employer argues that it has a legal responsibility to safeguard the personal information of the clients coming to the Child Support Office seeking assistance through that department; that the Grievant was well aware of the information regarding confidentiality through staff meetings and policy statements given to her; that the Grievant chose to discuss the case at issue here with the Daughter; that neither the Daughter nor the Grievant had any right or involvement with this particular case; that neither should not have had any discussion with anyone regarding it; that both testified that they

discussed the Former Husband and the Client on many occasions; and that this informal discussion was improper on the part of the Grievant since she had access to confidential information regarding the Client.

The Employer also argues that it has established a progressive discipline policy which indicates the proper procedure to be used when it becomes necessary to discipline an employee; that on July 17, 1992, the Grievant was given a written warning for poor work performance; that on July 21, 1992, the Grievant was given a one-day suspension for falsifying information on her time sheet; that the Manager considered the progressive discipline policy in reviewing this case and in determining that the next appropriate step was a five day suspension; that the Manager was not arbitrary or capricious in his decision to discipline the Grievant by followed the progressive discipline policy in a fair and equitable manner; and that there was no violation of the labor agreement.

In addition, the Employer argues that the Client indicated that personal statement were made about her case which would only have been known to the Grievant; that the Client relayed this to the Manager and the Child Support Specialist and a signed document was a true statement of the facts involving the case; that the incident did occur; and that information was discussed outside of the office, a breach of confidential information per departmental policy, state policy and state statutes.

The Employer also argues that the Daughter and the Former Husband had spoken about his paternity of the client's child on numerous occasions; that these discussions were totally inappropriate and should not have occurred; that the Grievant testified that the family had discussed the problems of the Former Husband and the Client; and that this was something that should not have been discussed.

Finally, the Employer argues that there was a fair investigation of the facts; that the statements made by the witnesses for the Employer are credible; that the Unions' witnesses testified that they had discussed this case outside the office which is a breach of confidentiality; that the incident did occur; that the Employer did a fair and complete investigation into the circumstances surrounding the incident; and that the Employer found there was a violation of the confidentiality policies.

The Employer therefore asserts that there was no violation of the labor agreement and that the grievance should be denied.

DISCUSSION

The issue before this Arbitrator is whether the Employer had proper cause to suspend the Grievant for five days beginning September 3, 1992. 3/

3/ I find the term "proper cause" to be synonymous with "just cause". See, i.e., Worthinton Corp., 24 LA 1, 6-7 (McGoldrick, 1955).

In order to decide if the Employer had proper cause to suspend the Grievant for five days, up to four determinations must be made. First, it must be determined whether the Employer conducted a proper investigation of the charge against the Grievant. If the investigation is lacking in important elements of due process, the Employer did not have proper cause to discipline the Grievant as the Employer would not have had all the information necessary to make a proper decision. Second, if the Employer conducted a proper investigation, it then must be determined whether the Employer had sufficient proof to find that the Grievant had committed an action for which she can be disciplined. If the Employer did not have sufficient proof to make such a finding, the Employer has failed to show that it had proper cause to discipline the Grievant. Third, if the Employer had sufficient proof that the Grievant committed the offense charged, it must be determined whether the punishment is proper in relation to the offense, the Grievant and the Employer. If the discipline is not in proportion to the offense, if it is not appropriate based upon the Grievant's work history or if it is more severe than other discipline given by the Employer to other employes for similar offenses, the Employer did not have proper cause to suspend the Grievant for five days. Fourth, if the punishment is not proper, it must then be determined what the proper punishment should be.

As to the first determination, the Employer argues that it did a fair and complete investigation into the circumstances surrounding the incident. The Employer asserts that the statements made by the Client were corroborated in her testimony, and that the testimony of the Daughter indicated that she and the Grievant had discussed the Client's child support case outside the office. While this evidence may go to the determination of whether the Grievant committed the offense, it does not go to the determination of whether the Employer conducted a proper investigation of the charge against the Grievant.

By its very nature, the investigation of charges occurs prior to the determinations of guilt and punishment. In this case, the investigation was conducted by the Manager. The Manager received a telephone call from the Client. The Client told the Manager that the Former Husband had told the Client that the Daughter had told the Former Husband that the Grievant had told the Daughter that the Client had filed for child support, naming the Former Husband as father of the child. This is the allegation of misconduct against the Grievant. At this point the investigation should begin.

The Manager testified as to what happened after the telephone call. He went to a meeting of department heads. After the meeting, he spoke with the Personnel Director. He then reviewed

the Policy and Procedure Manual. Next he reviewed the Grievant's personnel file. He then determined to give the Grievant a five day suspension effective the next day.

This was not an investigation of the charges against the Grievant but a determination of the appropriate punishment if the Grievant was guilty of the charge. This "so-called" investigation is analogous to Mary Smith calling the police station and telling the desk sergeant that Jane Doe had trespassed on her lawn. Mary states that she knows Jane trespassed on her lawn because Mary's boyfriend told Mary that his ex-wife (who is Jane's daughter) had told him that her mother (Jane) had told her that she (Jane Doe) had trespassed on Mary Smith's grass. The desk sergeant "investigates" the alleged crime by reading the statutes and finding that trespassing is against the law, and by reviewing Jane's record and finding that she had a speeding ticket two months ago. Based upon this, the desk sergeant determines Jane Doe is guilty of trespassing and orders her to jail for five days.

As in that analogy, the Manager's investigation did not include interviewing the witnesses; in this case, the Former Husband and the Daughter. These are the people who had the conversation in Wal-Mart. Either one of them could have been lying. So how did the Manager determine if the Former Husband was telling the Client the truth? The Manager did not bother investigating that. Even if the Former Husband was telling the truth to the Client, the Manager took no action to determine if the Daughter was telling the Former Husband the truth. These are complicated personal relationships involved here, but it does not appear that the Manager took any of this into consideration.

Nonetheless, the Manager might have been able to conduct a fair investigation if he had interviewed one person, if he had interviewed the Grievant prior to determining her guilt and the appropriate punishment. But he did not do that. He did not ask the Grievant her side of the story. Basically the Manager believed a bare allegation from a person who was basing that allegation upon hearsay to the third degree. How did the Manager know that the Grievant was guilty of the offense? The Client told him so. How did the Manager determine that the Client was telling the truth? He assumed it. Before he even talked to the Grievant, he had decided she was guilty and would be punished. He gave the Grievant no opportunity to hear and explain or deny the charges against her. He gave himself no access to the one person who could provide him with the information needed to fairly determine if she committed the offense and, if so, what would be the appropriate punishment.

This investigation was anything but fair. It showed a certain prejudice against the Grievant, a predisposition to assume

the worse about the Grievant with no allowance for any input by her prior to determination of guilt, with no regard for any mitigating factors on her side which might exist, with no possibility allowed that she might not be guilty as someone has accused her. The Manager was not an objective fact finder and decision maker in this investigation. He did not do the work necessary to investigate all the facts. The Manager was willing to assume the Grievant guilty and to impose punishment, but he was not willing to presume her innocent and find out her side of the story prior to doing so. The Manager, with only a hearsay allegation of wrongdoing against the Grievant, believed the hearsay allegation without any opportunity for the Grievant to answer the charge prior to determination of guilt. This is the essence of unfairness.

In addition, the Manager asked the Client to prepare a statement. The Client refused to do so. The record is unclear as to who drafted the statement: the Manager, the Case Specialist or both. In any case, a representative of the Employer drafted the statement which was ultimately signed by the Client and admitted into evidence at the hearing. While it is a good idea to get statement from complainants in writing, I have grave concerns about the procedure in this case. When the Employer moved from taking the complaint into drafting it,

another question of fairness arose. While in and of itself it is not enough to overturn the discipline in this case, it adds to the Employer's problems in regard to how this investigation was conducted.

Based upon the foregoing, I determine that the Employer did not conduct a proper investigation of the charge against the Grievant and, therefore, did not have proper cause to discipline the Grievant. This, in and of itself, is enough for me to determine that the Employer violate the contract when it gave the Grievant a five day suspension on September 2, 1992. But I also want to react to the second and third determinations.

Second, even if the Employer had conducted a proper investigation, it must be determined whether the Employer had proof that the Grievant committed an action for which she can be disciplined. According to the Employee Report, the charge against the Grievant is breach of confidential materials. The breach is that she allegedly told the Daughter that the Client had opened a case and was going to pursue paternity against the Former Husband. At the time of the suspension, the only evidence to support this charge is the allegation made by the Client herself, a charge based upon hearsay three times removed. This proof does not meet any minimum requirement and, therefore, at the time of discipline, the Employer did not have sufficient proof that the Grievant committed any action for which she could be disciplined.

At hearing, the Case Specialist testified that the Client told her that the Daughter had made statements to the Former Husband which had put a strain in the Client's relationship with the Former Husband. When the Case Specialist was asked by Counsel for the Union to state what information the Client had told her had been disclosed by the Daughter to the Former Husband, the Case Specialist refused to answer on the grounds of confidentiality. When the Union moved the Arbitrator to order the witness to testify, the Employer argued that the Case Manager could not legally disclose confidential information. Based upon that assertion, the Arbitrator denied the Union's motion. However, the Arbitrator advised the parties that only those breaches of confidentiality which were specified could be used against the Grievant.

Yet, on brief, the Employer attempts to broaden the alleged breach. According to the Employer, the Client testified that she had given the Grievant information about dates of divorce and other personal statements which were discussed by the Daughter with the Former Husband when they met in the store. Yet the record indicates that the divorce referred to by the Client was the Former Husband's divorce. No one had to disclose that date to the Daughter as she was a party to this divorce. In terms of the

other statements which the Client testified to as being disclosed to the Former Husband by the Daughter, the Client does not specify any statement other than that the Client had filed for child support. 4/ As all the other statements are unspecified, the Grievant will not be required to defend herself against them.

The Employer also argues that, based upon the Client's signed statement, information was discussed outside the office which is a breach of confidential information. But the only thing the signed statement says is that the Daughter "knew the details of the case at your agency and then told him to have blood tests done because she doesn't believe that he is the father of my child." Again, the details are unspecified and cannot be used against the Grievant.

In addition, the Employer notes that the Daughter testified that she had spoken with the Former Husband on several occasions regarding his paternity of the child in question. These conversations occurred both prior to and after the Grievant started working at the Child Support Office. Prior to the Client's coming into the office, the Former Husband told the Daughter that the Client was going to pursue paternity. The Daughter told the Grievant (not the Grievant told the Daughter) that the Client was coming into the office. The Daughter advised the Grievant not to get involved. 5/

According to the Employer, "This discussion was totally inappropriate and should not have occurred." The Employer is wrong. No confidential information was involved in this discussion. The Client had not come into the office at this time, so all we have are two people talking about something that might happen in the future. The Employer cannot point to any statute or policy which suggests that someone in the Grievant's position cannot be party to a conversation about someone who may come into the office in the future.

Related to this, the Employer notes that the Grievant testified that the Daughter had discussed the problems of the Former Husband and the Client with the Grievant for some time, beginning long before the Grievant went to work for the Child

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4/ What the Client did testify to is that she had told the Grievant a lot of details and she was now worried that the Grievant had told the Daughter.

5/ This appears to be the start of the Grievant's efforts to be removed from having any conflict of interest by working with the Client, an effort that took her to the Case Specialist, the Manager, the Personnel Committee and the Law Enforcement Committee, an effort which was thwarted each step of the way.

Support Office. According to the Employer, "This information, even though there had been a family relationship, was not something that should be discussed outside of the office." Again, the Employer cannot point to any authority to support this position. The Grievant is accused of breaching confidential information received as the Reception Clerk. To suggest that she can not talk about people, even gossip, is incorrect.

Thus, the only breach of confidentiality before this Arbitrator is that the Grievant allegedly told the Daughter that the Client had filed for child support and paternity against the Former Husband. None of these incidents go to show that the Grievant disclosed any confidential information to the Daughter. The Employer did not point to any other testimony or evidence to support its claim that the Grievant disclosed confidential information to the Daughter. Indeed, the Employer did not prove that the Grievant disclosed confidential information to the Daughter, specifically, that the Client had filed for child support and paternity against the Former Husband.

Based upon the foregoing, I determine that the Employer did not have sufficient proof of wrongdoing by the Grievant at the time of discipline, and that the Employer failed to meet its burden of proof at hearing that the Grievant committed the offense with which she is charged. Therefore, even if the Employer had conducted a proper investigation, I would find that the Employer did not have proper cause to discipline the Grievant and, thereby, violated the contract when it gave her a five day suspension.

This is not to suggest that the Employer does not have a legal responsibility to safeguard the personal information of the clients coming to its Child Support Office. Nor is it meant to be read as saying that the Employer cannot use discipline when an employe commits a breach of confidentiality. If the Employer had conducted a fair investigation in this case and proven that the Grievant had disclosed confidential information, I would most certainly have upheld the five day suspension. Such was not the case, however. Therefore, for the reasons stated above, the Arbitrator issues the following

AWARD

1. That the Employer violated the contract when it gave Jodell Henning a five-day suspension on September 2, 1992.

2. That the grievance is granted; that said five-day suspension is rescinded; that the Employer make the Grievant whole for said five-day suspension,

including back pay and any benefits lost as a result of the five day suspension; and that the Employer remove all references to the five-day suspension from its personnel files.

3. That I will retain jurisdiction in this matter pending the Employer's granting of the relief awarded; and that I will relinquish jurisdiction on September 1, 1993, unless I receive a written request from one of the parties on or before August 31, 1993, that I maintain jurisdiction.

Dated at Madison, Wisconsin, this 13th day of July, 1993.

By James W. Engmann /s/
James W. Engmann, Arbitrator